U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 November 2006

CASE NO.: 2006-LHC-88

OWCP NO.: 06-196463

IN THE MATTER OF

W.T.,
Claimant

v.

GULF CONCRETE, LLC/BAYOU CONCRETE COMPANY, INC.,
Employer

and

ZURICH NORTH AMERICAN,
Carrier

APPEARANCES:

Mitchell G. Lattof, Sr., Esq.
On behalf of Claimant

Richard W. Franklin, Esq.
On behalf of Employer/Carrier

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. § 901, *et. seq.*, brought by W. T. ("Claimant"), against Gulf Concrete, LLC/Bayou Concrete Company, Inc., ("Employer"). The issues raised by the parties could not be resolved administratively, and the matter was referred to the undersigned in the Office of Administrative Law Judges for a formal hearing. The hearing was held on May 16, 2006 in Mobile, Alabama.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced sixteen (16) exhibits, which were admitted, including: LS-203, LS-215a LS-207 forms, letter from Daniel E. Sellers, Ph.D. dated June 3, 1991, deposition testimony excerpts from November 26, 1990 and June 21, 1991 depositions of Jim D. McDill, Ph.D., Occupational Safety and Health Administration ("OSHA") investigatory records regarding Ryan Walsh Stevedoring operations at Alabama State Docks from 1986, a report from Michael F. Seidemann, Ph.D. regarding noise level survey of stevedoring operations at Alabama State Docks, excerpts from corporate deposition of Alabama Dry Dock & Shipbuilding from March 9, 1988, Employer's response to Claimant's initial discovery requests, letter from Tonia M. Beverly, Au.D., CCC-A dated April 26, 2005 regarding Claimant together with an audiogram, Claimant's W-2 and 1099 forms, Claimant's computation of average weekly wage and weekly compensation rate, deposition testimony excerpts from October 17, 1989 deposition of Randy Abrams, letter from United States Bankruptcy Administrator Southern District of Alabama to Claimant dated March 28, 2006 regarding Amendments, National Institute for Occupational Health and Safety ("NIOSH") Occupational Noise Exposure Revised Criteria 1998, and written testimony submitted by American Speech-Language-Hearing Association ("ASHA") to Department of Transportation – Federal Railroad Administration regarding Notice of Proposed Rulemaking Occupational Noise Exposure for Railroad Operating Employees dated September 15, 2004.[1]

Employer/Carrier introduced three witnesses, Robert Cowden, Kathy Wilkins-Jones, Au.D., CCC-A, F-AAA, and Dan Deakle, and submitted thirteen (13) exhibits into the record, including: photographs of Employer's truck and another party's car following a collision on February 18, 2005, Alabama Uniform Traffic Accident Report regarding the February 18, 2005 collision, letter from Tonia M. Beverly, Au.D., CCC-A dated April 26, 2005 regarding Claimant, report from Kathy Wilkins-Jones, CCC-A, F-AAA regarding Claimant, LS-203 form, Claimant's April 26, 2005 audiogram, LS-215a form, Sound Level Meter Noise Exposure Determination forms for Employer's McIntosh plant dated February 20, 2003, Schillinger plant dated May 26, 2000, and Theodore plant dated April 8, 1998, Equal Employment Opportunity Commission ("EEOC") file regarding Claimant's discrimination claim against Employer, records regarding Claimant's wages, National Labor Relations Board ("NLRB") file regarding Claimant's unfair labor practice claim against Employer, Claimant's personnel file, and Claimant's bankruptcy petition dated October 14, 2005.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

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[1] References to the transcripts and exhibits are as follows: trial transcript - Tr.___; Administrative Law Judge's exhibits - ALJ-___, p.___; Claimant's exhibits - CX-___, p.___; Employer's exhibits - EX-___, p.___. Claimant's and Employer's exhibits contained many duplicates as indicated below. Where duplicates exist, references will generally be made to only one exhibit. The following exhibits were duplicates: CX-1, p. 2 and EX-5, p.1; CX-2, pp. 1-2 and EX-7, pp. 1-2; and CX-10, pp. 1-4 and EX-3, pp. 1-2, EX-6, pp. 1-2.

I. STIPULATIONS

The parties stipulated and I find:

1. Claimant's last day of Employment with Employer was in February 2005;

2. An employer/employee relationship existed at the time of Claimant's alleged hearing loss;

3. Employer received notice of Claimant's alleged hearing loss on June 8, 2005;

4. Employer filed a Notice of Controversion with the Office of Workers' Compensation Programs on October 12, 2005;

5. Claimant underwent an audiological evaluation performed by Tonia M. Beverly, Au. D., C-AAA on April 26, 2005 which showed Claimant has a 7.5% binaural hearing impairment;

6. Claimant is presently employed by a different employer; and

7. Claimant's average weekly wage is $857.21 and his corresponding weekly compensation rate is $571.47. (ALJ-1, pp. 1-2).

II. ISSUES

1. Jurisdiction;

2. Judicial estoppel;

3. Causation;

4. Penalties; and

5. Attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a forty-two (42) year old male who worked for Employer for approximately five and one-half (5½) years from November 1, 1999 to February 2005. (Tr. 23, 37, 42). Claimant worked as a concrete truck driver for Employer out of Employer's Theodore, Canal,

Schillinger Road, Pascagoula, Citronelle, Jackson, and Bucks plants. (Tr. 24-25). According to Claimant, the process of loading a concrete truck requires backing up to a hold loaded with concrete and winding up the big rotating drum on the back of the truck and pouring the concrete into the drum. (Tr. 24). Delivery of concrete consisted of backing the truck up to the desired delivery location, allowing the customer to inspect the concrete, adding water, if necessary in which case Claimant would wind the rotating drum of the truck up again to mix the water with the concrete, and pouring of the concrete onto the desired location. (Tr. 26).

Some of the sites Claimant delivered to were on the waterfront, including Alabama State Docks, Atlantic Marine, Battleship Bender in Bayou La Batre, Ingalls Shipyard in Pascagoula, and Pinto Island. (Tr. 26). In his five and one-half (5½) years employment with Employer, Claimant made about twenty (20) or more deliveries of concrete to Alabama State Docks, Atlantic Marine, Battleship Bender, and Pinto Island. (Tr. 26-27, 37). Claimant also made about twenty (20) or more deliveries of concrete to Ingalls Shipyard. (Tr. 27, 41). Claimant claims to have been exposed to high volume noise produced by machinery at the waterfront facilities while delivering concrete to these sites. (Tr. 27, 33, 35, 40, 42).

Claimant is currently employed with Asphalt Services as a dump truck driver. (Tr. 43). Prior to working for Asphalt Services, Claimant worked for Morris Concrete as a concrete truck driver, for Meadowbrook Meats as a delivery truck driver, for Disposal as a truck driver, for Freezy Hauling as a truck driver, for Hirschbach as an eighteen-wheeler truck driver, as a bus driver at a pipeline facility, in construction for Tom Ollinger, in maintenance with International Paper/BE&K, and at Alabama State Docks for two (2) or three (3) days as a longshoreman. (Tr. 43-47, 49). At Alabama State Docks, Claimant took vegetables and things of that sort off ships. (Tr. 49-50). Claimant contends he was not exposed to loud noise at Alabama State Docks because he was working inside a ship and was required to wear hearing protection. (Tr. 49). While working for BE&K at International Paper Claimant contends he was not exposed to any loud noise other than an occasional loud whistle. (Tr. 46). Claimant further contends that while working for BE&K he had hearing protection, but did not utilize his hearing protection equipment unless he went inside the International Paper plant to use the restroom. (Tr. 46-47).

On April 26, 2005, Claimant had his hearing tested, which resulted in his being given an audiogram showing a 7.5% binaural hearing loss. (CX-10, pp. 1-4). On June 8, 2005, Claimant sent a letter to Employer informing Employer of his hearing loss and his allegations that such loss was a result of his work as a concrete truck driver with Employer. (CX-1, p. 1). On October 12, 2005, Employer filed a Notice of Controversion of Right to Compensation with the Office of Workers' Compensation Programs. (CX-3, p. 1). The matter was referred to the Office of Administrative Law Judges for hearing on October 13, 2005 and was set for hearing before the undersigned on May 16, 2006. (Tr. 5).

B. Noise Level Records

According to a February 20, 2003 Sound Level Meter Noise Determination Form prepared by Robert Cowden of Safety Plus regarding Employer's McIntosh plant, noise exposure levels at the plant were sixty-six (66) decibels in the break room, eighty-seven (87) decibels at

the loading site, eighty-three (83) decibels at the wash down site, eighty-two (82) decibels riding in a truck during low revolutions per minute ("RPMs"), eighty-four (84) decibels riding in a truck during high RPMs, and eighty-one (81) decibels at the unloading site. Based on these noise exposure levels, Mr. Cowden determined there was no over-exposure to noise at this plant. (EX-8, p. 1). A May 26, 2000 Sound Level Meter Noise Determination Form prepared by Mr. Cowden regarding Employer's Schillinger plant, indicates noise exposure levels at the plant were sixty-four (64) decibels in the break room, eighty-eight (88) decibels at the loading site, eighty-one (81) decibels at the wash down site, eighty-two (82) decibels riding in a truck during high RPMs, eighty-four (84) decibels riding in a truck during low RPMs, and eighty (80) decibels at the unloading site. Based on these noise exposure levels, Mr. Cowden determined there was no over-exposure to noise at this plant. (CX-8, p. 2). An April 8, 1998 Sound Level Meter Noise Determination Form prepared by Mr. Cowden regarding Employer's Theodore plant, indicates noise exposure levels at this plant were sixty-four (64) decibels in the break room, eighty-seven (87) decibels at the loading site, eighty-one (81) decibels at the unloading site, eighty-five (85) decibels riding in a truck during high RPMs, eighty-one (81) decibels riding in a truck during low RPMs, and eighty-one (81) decibels at the wash down site. Based on these noise exposure levels, Mr. Cowden determined there was no over-exposure to noise at this plant. (CX-8, p. 3).

Testimony submitted by ASHA to the Department of Transportation on September 15, 2004, indicates ASHA supports an eight (8) hour time-weighted average of eighty-five (85) decibels with an exchange rate of three (3) decibels for the calculation of time-weighted average as an action level for noise exposure for railroad employees. (CX-16, p.2). In addition, according to the 1998 revised criteria regarding occupational noise exposure published by the NIOSH, an eight (8) hour time-weighted average of eighty-five (85) decibels with an exchange rate of three (3) decibels for the calculation of time-weighted average is the recommended exposure limit for occupational noise exposure. (CX-15, pp. 5, 19). Excess risk of developing occupational noise-induced hearing loss under this recommended level of exposure with a presumed forty (40) year lifetime exposure, according to NIOSH, is eight percent (8%) and is considerably lower than the twenty-five percent (25%) excess risk at ninety (90) decibels which is currently enforced by OSHA and the Mine Safety and Health Administration ("MSHA"). (CX-15, p. 5).

A May 1, 1991 report authored by Michael F. Seidemann, Ph.D. shows in general stevedoring activities at Alabama State Docks represented sound exposure levels ranging between 77.7 decibels and 89.3. Dr. Seidemann's report also showed that the overall course of sound exposures to which stevedores at Alabama State Docks were exposed were relatively low and not capable of producing severe hearing loss even over very prolonged durations of exposure. (CX-7, p. 4). Excerpts from deposition testimony from an October 19, 1989 deposition of Randy Abrams, an Ingalls Shipyard Industrial Hygienist, indicates a time-weighted average of eighty-five (85) decibels was the recommended action level endorsed by OSHA and that there were areas of the shipyard where noise levels were in excess of eighty-five (85) decibels. (CX-13, pp. 2, 7, 14, 21). Excerpts from a corporate deposition of Alabama Dry Dock & Shipbuilding dated March 9, 1988 shows that employees were required to wear hearing protection whenever they were in an area where they would be exposed to a time-weighted average of eighty-five (85) decibels or more. (CX-8, pp. 6-7, 23, 26-27, 33). OSHA investigatory records regarding Ryan Walsh Stevedoring operations at Alabama State Docks

show that on June 9, 1986 Ryan Walsh Stevedoring received a citation for not ensuring employees wore hearing protection in situations where employees were exposed to daily noise exposure in excess of the permissible daily exposure of eight (8) hour time-weighted average of ninety (90) decibels. (CX-6, p. 8).

C. Audiogram

On April 26, 2005 Claimant underwent an audiological evaluation. (Tr. 66-69; CX-10, pp. 1-4). As a result of this evaluation, Claimant received an audiogram and a letter from Tonia M. Beverly, Au.D., CCC-A. (CX-10, pp. 1-4). The letter from Dr. Beverly indicated Claimant reported having fluctuating hearing difficulties with tinnitus and aural fullness binaurally since 1998. (Tr. 70; CX-10, p. 1). The letter also indicated Claimant worked at International Paper Company from 1984 to 1987 where he was exposed to loud noises from machinery and other equipment though he reportedly wore hearing protection. (Tr. 71; CX-10, p. 1). In addition, Dr. Beverly indicated Claimant stated he was a truck driver for Employer for six (6) years during which time he was intermittently exposed to loud noises and did not wear hearing protection. (Tr. 72; CX-10, p. 1). Dr. Beverly further noted Claimant stated he worked intermittently at Alabama State Docks as a longshoreman for a total of one (1) year over a three (3) year period during which time he was exposed to loud noises from heavy machinery though he occasionally used hearing protection. (Tr. 73; CX-10, p. 1).

Following her interview with Claimant and review of Claimant's audiogram, Dr. Beverly concluded Claimant suffers from a mild to moderate sensorineural hearing loss for both the right and left ears and has a binaural hearing impairment of 7.5%. (CX-10, p. 2). Dr. Beverly also concluded that in view of Claimant's history, exposure to excessive noise levels could have contributed to the hearing loss present in Claimant's ears. Dr. Beverly did not specifically indicate Claimant's hearing loss was the result of maritime employment. (CX-10, p. 2).

D. Testimony

Claimant's Testimony

Claimant is a forty-two (42) year old male who possesses a high school education. (Tr. 23). Claimant worked for Employer for approximately five and one-half (5½) years from November 1, 1999 to February 2005. (Tr. 23, 37, 42). Claimant worked out of Employer's Theodore, Alabama plant, Canal plant, Schillinger Road plant, Pascagoula plant, Citronelle plant, Jackson plant, and Bucks, Alabama plant. (Tr. 24-25). Employer employed Claimant as a concrete truck driver. (Tr. 24). While working for Employer, Claimant worked five (5) to seven (7) days a week depending on the demand for concrete. (Tr. 25). According to Claimant, the process of loading a concrete truck requires backing up to a hold loaded with concrete and winding up the big rotating drum on the back of the truck and pouring the concrete into the drum. (Tr. 24). Delivery of concrete consisted of backing the truck up to the desired delivery location, allowing the customer to inspect the concrete, adding water, if necessary in which case

Claimant would wind the rotating drum of the truck up again to mix the water with the concrete, and pouring of the concrete onto the desired location. (Tr. 26).

Some of the sites Claimant delivered to were on the waterfront, including Alabama State Docks, Atlantic Marine, Battleship Bender in Bayou La Batre, Ingalls Shipyard in Pascagoula, and Pinto Island. (Tr. 26). In his five and one-half (5½) years employment with Employer, Claimant made about twenty (20) or more deliveries of concrete to Alabama State Docks, Atlantic Marine, Battleship Bender, and Pinto Island. (Tr. 26-27, 37). Claimant also made about twenty (20) or more deliveries of concrete to Ingalls Shipyard. (Tr. 27, 41). According to Claimant, deliveries of concrete to Alabama State Docks would either be delivered to a ship or a dock. Claimant stated that during his deliveries at Alabama State Docks there was real loud noise produced by cranes operating at the docks. (Tr. 27).

Deliveries of concrete to Atlantic Marine, according to Claimant, were delivered to docks close by ships that were "sitting" in the water at Mobile River for purposes of repairing shipyard docks and decks of ships. (Tr. 28, 34). In order to deliver concrete to docks near ships at Atlantic Marine, Claimant would back up his concrete truck to either a concrete pump or a concrete pump truck and pour the concrete into the pump or the pump truck. (Tr. 30-31). The pump or pump truck would then be used to deliver the concrete on board a ship deck, a pier, or a dock at the shipyard. (Tr. 31-32). The noise at Atlantic Marine during Claimant's deliveries of concrete was such that Claimant and others at the shipyard had to "holler" at each other in order to communicate with one another. (Tr. 33, 35-36). Sometimes the noise at Atlantic Marine was so loud that Claimant and others had to communicate with one another using hand signals because the noise made it impossible to verbally communicate with one another. (Tr. 36). Some of the noise at Atlantic Marine was a product of others working with drills, cranes and jackhammers. (Tr. 33, 35). There was also a bell at Atlantic Marine that produced a "real long noise." (Tr. 35). During his deliveries of concrete to Atlantic Marine, Claimant would spend anywhere from ten (10) minutes to two (2) hours at the shipyard depending on how quickly shipyard employees could get to pouring the concrete from Claimant's truck. (Tr. 36).

Claimant made deliveries to Ingalls plant off Industrial Road in Pascagoula, Mississippi for purposes of supplying Ingalls with concrete for construction of a bridge, piers, hulls, and utility poles. (Tr. 37-38). According to Claimant, delivery of concrete to Ingalls was similar to the delivery of concrete to Alabama State Docks. (Tr. 37-38). While at Ingalls, Claimant stated the concrete from his truck would be delivered either directly from the chute of his truck or to a pump or pump truck. When concrete from Claimant's truck was delivered directly from the chute of his truck, it was poured onto a "spot" at the shipyard that wasn't near the water. (Tr. 39). Otherwise, the concrete from Claimant's truck was delivered to either a pump or pump truck. (Tr. 39-40).

Claimant stated noise at Ingalls to which he was exposed was produced by machinery similar to that at Atlantic Marine like jackhammers and cranes. (Tr. 40, 42). Claimant testified that the machinery noise was worse at Ingalls than at Alabama State Docks because there were more people and more activity at Ingalls than at Alabama State Docks. (Tr. 40). Claimant would wear earplugs at times while at Ingalls because the noise was so loud. (Tr. 40-41). Claimant was able to verbally communicate with others at Ingalls by talking "real loud." (Tr.

40). Otherwise, Claimant communicated through use of hand signals or followed direction from a horn that was used at Ingalls when concrete was poured from delivery trucks into a pump. When the horn sounded once, concrete was to be poured into the pump. When the horn sounded twice, the pouring of concrete into the pump was to stop. (Tr. 41). According to Claimant, he has had hearing loss for the past three (3) or four (4) years. Claimant stated that his ears used to "pop" and that they have gotten a little worse over the years. Claimant testified that at times he can see people talking, but cannot hear them. (Tr. 41-42).

On cross-examination, Claimant testified that he is currently employed with Asphalt Services as a dump truck driver. (Tr. 43). Prior to working for Asphalt Services, Claimant worked for Morris Concrete as a concrete truck driver, for Meadowbrook Meats as a delivery truck driver, for Disposal as a truck driver, for Freezy Hauling as a truck driver, and for Hirschbach as an eighteen-wheeler truck driver. (Tr. 43-44). Claimant also worked as a bus driver at a pipeline facility, in construction for Tom Ollinger, and in maintenance with International Paper. (Tr. 44-45). Claimant testified that although he indicated he had worked for International Paper, he actually worked for BE & K, a contractor that provided ground maintenance to International Paper. (Tr. 45-46).

Claimant stated that while working for BE & K he was not exposed to any loud noise other than an occasional loud whistle. (Tr. 46). Claimant further stated that while working for BE & K he had hearing protection, but did not utilize his hearing protection equipment unless he went inside the International Paper plant to use the restroom. (Tr. 46-47). According to Claimant, the only times during which he was required to wear hearing protection at International Paper was when he went inside the plant. (Tr. 47).

Besides verifying his employment history with Asphalt Services, Morris Concrete, Meadowbrook Meats, Disposal, Freezy Hauling, Hirschbach, Tom Ollinger, and BE & K, Claimant testified that he worked at Alabama State Docks for two (2) or three (3) days as a longshoreman. (Tr. 47-49). Claimant testified that he took vegetables and things of that sort off ships, but denied loading or unloading ships while working at Alabama State Docks as a longshoreman. (Tr. 49-50). Claimant stated he was not exposed to loud noise at Alabama State Docks because he was working inside a ship and was required to wear hearing protection. (Tr. 49). Claimant further stated that the work he did while at Alabama State Docks was different than the work he did for Employer at Alabama State Docks. (Tr. 64-65).

In addition, Claimant testified regarding his employment with Employer. Claimant confirmed that he drove a concrete mixer truck for Employer. (Tr. 50-51). According to Claimant, either a dispatcher or plant operator loaded his concrete mixer truck while he either sat and waited in a break room or stood and waited by his truck. (Tr. 51-52). Loading of his truck with concrete took approximately three (3) to four (4) minutes to accomplish. Although Claimant stated that on a few occasions "something happened, you might start moving on." (Tr. 52). After his truck was loaded with concrete, Claimant would drive the truck to a wash down area so that he could add water to the concrete mixture if necessary. When Claimant had to add water to the concrete mixture, he had to wind the concrete mixer truck up in order to blend the water with the concrete mixture. Claimant stated that his truck made a lot of noise whenever he had to wind it up. (Tr. 52-53). After Claimant delivered concrete, Claimant would wash the

chute of his truck down before leaving to pick up another load of concrete from Employer's plant. (Tr. 65-66).

According to Claimant, Employer's Theodore plant was his dispatching facility. Accordingly, Claimant mainly worked out of this facility. After Claimant's truck was loaded and the mixture blended if required, Claimant would leave Employer's Theodore plant for the specified delivery location. (Tr. 53, 56). Most of the time it took Claimant fifteen (15) to thirty (30) minutes to get from Employer's Theodore plant to the specified delivery location. (Tr. 54-55). Most of Claimant's deliveries of concrete were to construction sites. New house construction sites were among the construction sites to which Claimant delivered concrete. (Tr. 55). Besides delivering concrete, Claimant sometimes also delivered rocks to construction sites. (Tr. 56).

Claimant testified that he never boarded a vessel at Ingalls or Alabama State Docks during his employment with Employer. (Tr. 56-57). Claimant further testified that he would directly load concrete from his truck to a pump, a pump truck, or a ship at Ingalls. (Tr. 57-59). According to Claimant, when he loaded concrete from his truck to a ship at Ingalls, the chute of his truck would "go on the ship." (Tr. 58-59). When Claimant delivered concrete to a ship in this manner, he stated that he was exposed to loud noise "at the ship." (Tr. 59). Claimant denied that he only delivered concrete to Mississippi on a few occasions although that was his testimony in a NLRB proceeding in December, 2005. (Tr. 59-64). Claimant stated that he was not asked in the NLRB proceeding to clarify what he meant by a few occasions and that he considered a few occasions to mean ten (10), twenty (20) or "how many" since he worked for Employer for over five (5) years. (Tr. 61-62). Claimant stated further that what he meant by a "few occasions" is that he did not go to Mississippi all the time, but knows that he went to Mississippi several times. (Tr. 62, 64).

Claimant had his hearing tested in 2005 at the University of South Alabama's Speech and Hearing Center at the request of his Counsel whom Claimant contacted after reading an ad in a newspaper regarding free hearing tests. (Tr. 66-69; CX-10, pp. 1-4). Claimant testified that to "his knowledge at the time," he provided the staff at the hearing center with a true summary of his employment history. (Tr. 68). According to a letter from Tonia M. Beverly, Au.D., CCC-A, an audiologist at the hearing center, Claimant reported having fluctuating hearing difficulties with tinnitus and aural fullness binaurally since 1998. (Tr. 70; CX-10, p. 1). Dr. Beverly noted Claimant stated he worked at International Paper Company where he was exposed to loud noises from machinery and other equipment though he reportedly wore hearing protection from 1984 to 1987. (Tr. 71; CX-10, p. 1). Dr. Beverly also noted Claimant stated he was a truck driver for Employer for six (6) years during which time he was intermittently exposed to loud noises and did not wear hearing protection. (Tr. 72; CX-10, p. 1). In addition, Dr. Beverly noted Claimant stated he worked intermittently at Alabama State Docks as a longshoreman for a total of one (1) year over a three (3) year period during which time he was exposed to loud noises from heavy machinery though he occasionally used hearing protection. (Tr. 73; CX-10, p. 1).

According to Claimant, he never told anybody that he suffered from fluctuating hearing difficulties with tinnitus and aural fullness binaurally since 1998. (Tr. 70). Claimant stated that he might have told the staff at the hearing center that he worked at International Paper, but he

actually worked for BE & K. (Tr. 71, 75). Claimant also stated he told the staff at the hearing center that he was exposed to loud noise at International Paper but did not mean to say that he worked around loud noise at International Paper. (Tr. 75). Rather, Claimant meant to say he was exposed to loud noise at International Paper whenever he went inside to use the restroom or visit the cafeteria. (Tr. 75-76). In addition, although Claimant confirmed that he told the staff at the hearing center he wore hearing protection at International Paper, he meant to say that he was required to wear hearing protection in order to go inside the International Paper plant. (Tr. 76). Otherwise, Claimant did not wear hearing protection at International Paper since he worked outside the plant and was not there exposed to loud noise. (Tr. 75-76).

Claimant confirmed he worked for Employer for five and one-half (5½) years and not six (6) years and that he did use hearing protection while he worked for Employer although the letter from Dr. Beverly stated otherwise. (Tr. 72-73). In addition, Claimant stated that he only worked as a longshoreman at Alabama State Docks for a total of three (3) days over a three (3) year period although the letter from Dr. Beverly indicated that Claimant stated he worked for a total of one (1) year over a three (3) year period. (Tr. 73, 76-79). Claimant denied he told Dr. Beverly he worked for a total of one (1) year over a three (3) year period at Alabama State Docks. (Tr. 77-79). Instead, Claimant suggested Dr. Beverly might have misunderstood him. (Tr. 78-79).

According to Claimant, he was fired from Employer's employ because of a motor vehicle accident for which Employer said he fled. (Tr. 81, 95). Claimant stated, however, he was not aware of an accident and thought "it was a game." (Tr. 82). After entering the interstate and after being alerted by another motorist of the accident, Claimant returned to the accident scene where he noticed damage to the other driver's vehicle's right side which he believed was caused by the other driver hitting the median. (Tr. 82, 84-85). However, photographs of the other driver's car showed damage to the left side of the car. (Tr. 82, 85-86; EX-1, pp. 1, 3-5, 12). According to Claimant, the pictures of the other driver's vehicle were not taken until days later and he was not sure why the car had damage to its left side since on the night of the accident it only had damage to its right side. (Tr. 85-87). Claimant acknowledged that the official police report of the accident indicated that the other driver's vehicle sustained damage to its left side. (Tr. 88-90; EX-2, p. 1). The report, however, also indicated improper lane change or usage as a contributing circumstance to the accident but did not assign blame to either Claimant or the other driver. (Tr. 90-93; EX-2, p. 1). Claimant stated he was terminated from his employment with Employer because Employer said he caused the accident and then fled the scene. (Tr. 95-96). Claimant's Termination Report indicates Claimant was terminated for leaving the scene of an accident. (EX-12, p. 38). The Report further indicates that Claimant indicated he was not aware that he struck a vehicle which after being struck spun in front of him. (EX-12, p. 38).

Claimant denied filing a claim for benefits under the Act on June 8, 2005. Instead, Claimant stated his attorney filed the claim. (Tr. 98). Claimant indicated he did not understand what was meant when he was asked if he filed the claim since he did not physically file the claim himself though he confirmed he was a high school graduate and did not have any reading problems. (Tr. 98-100). Claimant also confirmed he filed for bankruptcy on October 14, 2005, four (4) months after he filed his claim for benefits under the Act. (Tr. 100; EX-13, pp. 1-22). Claimant further confirmed that he did not disclose his pending claim for benefits in his

bankruptcy suit. (Tr. 100-101). Rather, Claimant verbally informed the bankruptcy court shortly before the hearing with the undersigned of his pending claim for benefits as well as his NLRB claim and his civil suit. (Tr. 101-102, 104). Claimant stated he filed the bankruptcy petition on his own so he misunderstood what he was suppose to disclose in the petition. (Tr. 101, 103-104). However, Claimant stated bankruptcy court personnel required him to add his claim for benefits, his NLRB claim, and his civil suit to his bankruptcy paperwork. (Tr. 104). Claimant, however, acknowledged that none of these claims were listed in his cumulative amendments which were filed on May 12, 2006. (Tr. 104-107; EX-13, p. 15). Claimant suggested bankruptcy court personnel must have simply kept the documents regarding these claims instead of making a notation of these claims on his bankruptcy paperwork. (Tr. 107).

Robert Cowden's Testimony

Robert Cowden is the operations manager for a loss-control firm, Safety Plus, located in Mobile County. Mr. Cowden has been employed by Safety Plus for approximately eight and one-half (8½) years. (Tr. 112). Duties of an operations manager, according to Mr. Cowden, include managing loss control, safety, Department of Transportation compliance, regulatory compliance activities as well as supervision of training to monitoring activities. (Tr. 112-113). Mr. Cowden has an A.S. degree in Environmental Science with an emphasis on Hazardous Materials Management, has been working in the field for the past fourteen (14) years, and has completed multiple training classes offered through among others, the National Safety Council and OSHA. (Tr. 113).

According to Mr. Cowden, Safety Plus audits Employer's facilities to ensure they are in compliance with OSHA and other regulatory requirements. (Tr. 113-114). Safety Plus also provides Employer's employees with hearing loss conservation training. Through this hearing loss conservation training, employees are instructed about what is considered a noisy area and how to protect themselves in such areas through the use of hearing protection. (Tr. 114). For example, if an employee is in an area where it is noisy enough that he has to raise his voice, he is trained that in such a situation he should wear earplugs. (Tr. 115). Under OSHA requirements, if a company over an eight (8) hour shift has noise level exposure of a time-weighted average of eighty-five (85) decibels, then the company must provide earplugs and provide hearing loss conservation training to its employees. (Tr. 115-116). Mr. Cowden stated that Employer is not required to provide hearing loss conservation training or earplugs to its employees since the results of sound tests he has conducted at several of Employer's plants does not warrant such a compulsory program. (Tr. 116-124; EX-8, pp. 1-3). Mr. Cowden testified that both NIOSH and OSHA require companies perform noise level tests every so often. NIOSH requires companies perform such test every two (2) years, whereas OSHA requires such tests whenever there is a significant change in the facility or operations. (Tr. 124-125).

On cross-examination, Mr. Cowden testified that when he prepares noise level tests at Employer's facilities, he stands in each area tested for five (5) to six (6) minutes and records the highest noise level detected. (Tr. 125-126). Mr. Cowden confirmed that at Employer's Theodore plant a concrete truck driver would be exposed to eighty-seven (87) decibels during loading of concrete. (Tr. 126-127; EX-8, p. 3). Mr. Cowden also confirmed that a concrete

truck driver would be exposed to eighty-five (85) decibels while riding in a concrete truck. (Tr. 127; EX-8, p. 3). Mr. Cowden further confirmed that at Employer's Schillinger plant a concrete truck driver would be exposed to eighty-eight (88) decibels during loading of concrete. (Tr. 128; EX-8, p. 2). However, Mr. Cowden stated that a concrete truck driver would only be exposed to those levels of noise during loading if he was standing by the truck the whole time. Mr. Cowden stated the testing he performed at Employer's facilities measured the highest exposure a driver would be exposed to except that in his experience he has never known a concrete truck driver to stand by his truck during the entire loading process. (Tr. 128). Mr. Cowden confirmed that at Employer's McIntosh plant a concrete truck driver would be exposed to eighty-seven (87) decibels during loading of concrete. (Tr. 129; EX-8, p. 1).

Kathy Wilkins-Jones', Au.D, CCC-A, F-AAA, Testimony

Kathy Wilkins-Jones, Au.D., CCC-A, F-AAA is an audiologist who earned a bachelor's and master's degree from University of South Alabama and a clinical doctorate of audiology from the University of Florida. (Tr. 130-131). Dr. Wilkins-Jones also earned a certificate of clinical competence from ASHA, is a fellow of the American Academy of Audiology, and is licensed by the State of Alabama through the Alabama Board Examiners and Speech Pathology and Audiology. (Tr. 132-133). Dr. Wilkins-Jones testified that she has the same credentials as Dr. Beverly, the audiologist who evaluated Claimant at his Counsel's request. (Tr. 133).

Dr. Wilkins-Jones stated Employer's Counsel requested that she perform a cause and effect analysis of Claimant's hearing loss. (Tr. 133-134). Dr. Wilkins-Jones further stated that when trying to determine if the cause of one's hearing loss is noise exposure in the workplace, there is a standard practice developed by Dr. David Lipscomb, "the guru in noise-induced hearing loss," to follow. There are four criteria under this standard practice which must be considered in order to determine whether an individual's hearing loss is caused by noise exposure in the workplace. The criteria is as follows: (1) look at the individual's hearing loss configuration, in other words, the individual's audiogram; (2) look at the time-frame in which the individual claims the loss occurred; (3) look at the noise exposure that the individual incurred daily in the workplace; and (4) look at the individual's symptoms. (Tr. 134-136).

Dr. Wilkins-Jones reviewed Claimant's audiogram which was prepared by Dr. Beverly. (Tr. 136). According to Dr. Wilkins-Jones, normal hearing levels for an adult is zero (0) to twenty-five (25) decibels. (Tr. 143). Mild is between twenty-five (25) to thirty-five (35) or forty (40) and moderate is forty (40) to about seventy (70). (Tr. 167). Dr. Wilkins-Jones testified that Dr. Beverly found Claimant to be suffering from a mild to moderate sensorineural hearing loss and noted Dr. Beverly did not attribute this hearing loss to Claimant's employment with Employer. (Tr. 166, 168; CX-10, pp. 1-2; EX-4, p. 1). According to Dr. Wilkins-Jones, Claimant's audiogram showed that thirty-five (35) decibels was the hearing threshold, or the softest point Claimant could hear and respond to a sound two (2) out of three (3) times for each ear. (Tr. 138, 140-141). Dr. Wilkins-Jones stated that Claimant's audiogram also showed that at five hundred (500) hertz Claimant could hear and respond to a sound two (2) out of three (3) times to a tone of twenty-five (25) decibels for each ear. (Tr. 139). Dr. Wilkins-Jones further stated Claimant's audiogram showed that at one thousand (1000) hertz Claimant could hear and

respond to a sound two (2) out of three (3) times to a tone of thirty-five (35) decibels for each ear. (Tr. 139).

Although Claimant's audiogram showed Claimant's hearing threshold for both ears at thirty-five (35) decibels, Claimant's hearing threshold in his left ear at four thousand (4000) hertz was forty-five (45) decibels, while his hearing threshold for his right ear at four thousand (4000) hertz was thirty-five (35) decibels. (Tr. 136, 141). At six thousand (6000) hertz Claimant's hearing threshold in his left ear was forty-five (45) decibels and fifty-five (55) decibels in his right ear. At eight thousand (8000) hertz, Claimant's hearing threshold in his left ear was fifty-five (55) decibels and twenty-five (25) in his right ear. (Tr. 142).

Dr. Wilkins-Jones stated that in her opinion the audiogram performed by Dr. Beverly did not reflect workplace, noise-induced hearing loss because typically a workplace noise configuration is going to "hit four thousand (4000) hertz the hardest." Although a workplace noise configuration can at times "hit" three thousand (3000) hertz the hardest. Review of Claimant's audiogram shows Claimant's work pitch at six thousand (6000) in his right ear. (Tr. 144). According to Dr. Wilkins-Jones, six thousand (6000) hertz is typically affected by impulse or impact noise, a very loud noise of a very short duration such as Fourth of July fireworks right at your ear, hunting with the use of a gun, or loud music. (Tr. 144, 146-147). Claimant's audiogram shows Claimant's hearing recovers at eight thousand (8000) hertz, resulting in a noise notch on the audiogram represented by a deep V from six thousand (6000) hertz to eight thousand (8000) hertz. (Tr. 144). Had Claimant's hearing impairment been created by workplace noise, Dr. Wilkins-Jones stated she would expect to see the noise notch on the audiogram at four thousand (4000) hertz since four thousand (4000) hertz is typically where she would expect to see a machinery-type noise notch. According to Dr. Wilkins-Jones, eight thousand (8000) hertz is typically affected by age the onset of which can occur as early as thirteen (13) years of age. (Tr. 145).

Dr. Wilkins-Jones testified that with a workplace noise-induced hearing loss, the hearing loss is typically symmetrical, meaning each ear reflects the same degree of hearing loss. This symmetry in hearing impairment is expected since machinery noise comes at both ears at the same time. (Tr. 146). In this case, Claimant's hearing in his right ear is better than his hearing in his left ear. (Tr. 141-142, 146). Dr. Wilkins-Jones further testified she was of the opinion that Claimant's hearing loss was not the result of workplace noise because Claimant's audiogram showed that at the deeper pitches like two hundred fifty (250), five hundred (500) and one thousand (1000) Claimant's hearing was out of the normal zero (0) to twenty-five (25) range and, instead was in the mild loss category. (Tr. 147). According to Dr. Wilkins-Jones, machinery noise does not affect deeper pitches. (Tr. 147-148).

Dr. Wilkins-Jones also reviewed Claimant's speech reception threshold ("SRT") on the audiogram. A SRT is the softest point at which a person can hear and repeat two-syllable words. Claimant's audiogram showed his SRT to be twenty (20) decibels in his right ear and twenty-five (25) decibels in his left ear. (Tr. 148). The audiogram also showed Claimant had a discrimination score, the percentage of words which can be understood and repeated in a quiet environment, of ninety-six percent (96%) in his right ear and ninety-two percent (92%) in his left ear. According to Dr. Wilkins-Jones, these discrimination scores are normal. (Tr. 149).

Dr. Wilkins-Jones testified that in her opinion, Claimant's hearing loss in his left ear is more likely the result of age versus workplace noise-induced hearing loss. (Tr. 149). However, Dr. Wilkins-Jones stated Claimant's hearing loss in his right ear appears to be noise-induced but not workplace noise-induced hearing loss since Claimant's worst pitch in his right ear is at six thousand (6000) hertz, and since there is no symmetry in Claimant's hearing loss. (Tr. 150-151).

After testifying as to her opinions regarding Claimant's audiogram, Dr. Wilkins-Jones testified as to the time-frame of the hearing loss, stating that in studies that have been done from 1998 forward, individuals who work in high noise areas typically will not suffer a permanent hearing loss unless employed in that area for ten (10) to fifteen (15) years. (Tr. 152-153). However, impact or impulse noise can damage one's hearing immediately. Dr. Wilkins-Jones concluded using Mr. Cowden's noise level test results that Employer's concrete truck drivers would have a time-weighted average over the course of an eight (8) hour day of eighty-two (82) decibels. (Tr. 153). According to information released by NIOSH and OSHA, a person working in eighty-two (82) decibels of noise should be able to work in that level of noise for sixteen (16) hours a day without suffering any hearing loss. (Tr. 154).

Dr. Wilkins-Jones testified that the letter authored by Dr. Sellers and offered into evidence by Claimant states that a hearing loss injury can occur in persons who are exposed to noise levels of eighty-five (85) decibels or above. (Tr. 155; CX-4, p. 1). Dr. Wilkins-Jones stated that Dr. Sellers' finding coincides with the information released by both NIOSH and OSHA. (Tr. 155). Dr. Wilkins-Jones testified further that Dr. Sellers found that hearing loss can occur in persons exposed to eighty-five (85) decibels regardless of duration depending on individual tolerances. (Tr. 156; CX-4, p. 1). However, Dr. Wilkins-Jones testified that Dr. Sellers' letter was dated June 3, 1991 and that studies from 1998 forward have found that somewhere between zero (0) and three (3) percent of the population will lose hearing when exposed to a noise level of eighty-five (85) decibels for less than eight (8) hours a day. (Tr. 156-158, 169-170). Dr. Wilkins-Jones also stated that the studies from 1998 forward clarify Dr. Sellers' finding that hearing loss can occur in persons exposed to eighty-five (85) decibels regardless of duration depending on individual tolerances, stating that such a finding is dependent upon the way the noise level is tested. (Tr. 158-159). According to Dr. Wilkins-Jones, noise levels in studies from 1998 forward document only peak noise levels as opposed to an average of noise levels which was the way noise was measured in 1990. (Tr. 159).

Dr. Wilkins-Jones also reviewed the deposition testimony of Dr. McDill which was submitted into evidence by Claimant. (Tr. 160; CX-5, pp. 1-16). Dr. Wilkins-Jones stated that Dr. McDill's deposition testimony coincided with Dr. Sellers' letter to Claimant's Counsel. (Tr. 160). Dr. Wilkins-Jones noted that Dr. McDill's deposition testimony was from November 1990 and June 1991 so that it, like the letter from Dr. Sellers, did not include the more recent empirical data provided by studies from 1998 forward. Dr. Wilkins-Jones stated that neither Dr. Sellers' letter nor Dr. McDill's deposition testimony identified any sort of hearing loss identifiable to Claimant. (Tr. 161). Dr. Wilkins-Jones noted that there are several everyday items and experiences, such as a lawnmower or dining in a loud restaurant, which present noise levels of eighty-five (85) or ninety (90) decibels and which may be injurious if consistently exposed to for an extended period of time. (Tr. 163-164). This exposure is what prompts the use of a time-

weighted average when determining if a persons hearing loss is the result of work-related noise. (Tr. 164).

Dr. Wilkins-Jones stated that Claimant's clinical symptoms do not match a work-related noise-induced hearing loss because the time-frame does not match up since Claimant told Dr. Beverly that his hearing loss began to occur in 1998. (Tr. 164-165). Dr. Wilkins-Jones noted that Claimant in his cross-examination testimony denied telling Dr. Beverly that his hearing loss began to occur in 1998. Nevertheless, Dr. Wilkins-Jones stated Claimant's clinical symptoms did not match a work-related noise-induced hearing loss since Claimant's audiogram did not reflect a hearing loss produced by machinery type noise, and since Claimant testified experiencing a popping sensation in his ears. According to Dr. Wilkins-Jones, such a sensation is inconsistent with a work-related noise-induced hearing loss. Dr. Wilkins-Jones stated that in her opinion, Claimant's hearing loss was not a work-related noise-induced hearing loss since Claimant testified he had trouble hearing Counsel speak. (Tr. 165). According to Dr. Wilkins-Jones, if Claimant's hearing loss had been the result of work-related noise, Claimant would not have had trouble hearing Counsel speak since such a hearing loss makes it difficult to hear in a noisy environment. (Tr. 165-166). Dr. Wilkins-Jones testified that she did not find it particularly noisy in the courtroom. (Tr. 165). Dr. Wilkins-Jones further testified that based on Claimant's audiogram, the relevant time-frame and Mr. Cowden's noise level findings, it was her opinion that Claimant's hearing loss was not the result of work-related noise from his work for Employer. (Tr. 168-169).

On cross-examination, Dr. Wilkins-Jones testified that she was not paid to testify and was contacted by Employer's Counsel through information provided by Safety Plus. (Tr. 170-171). Dr. Wilkins-Jones used to run a hearing conservation testing company and Safety Plus bought her equipment. (Tr. 171-172). At that time, Dr. Wilkins-Jones told the staff at Safety Plus that if they ever needed someone to review a problem audiogram to contact her. Dr. Wilkins-Jones stated that Claimant's audiogram happened to be a problem audiogram. (Tr. 171). According to Dr. Wilkins-Jones, under OSHA regulations an audiogram that has a standard threshold shift should be reviewed by a certified audiologist or medical doctor, and that such audiograms are what she is referring to when she says problem audiograms. (Tr. 172-173). Dr. Wilkins-Jones confirmed that most of her work as an audiologist has been industry testing. (Tr. 173). Dr. Wilkins-Jones also confirmed that in her report she concluded configurations of Claimant's audiogram revealed a combination noise-induced hearing loss in the right ear and presbycusis, or age-related hearing loss, in the left ear. (Tr. 177; EX-4, p. 1). Dr. Wilkins-Jones further confirmed that presbycusis in a forty-two (42) year old male is not unusual since presbycusis can start occurring in people as young as thirteen (13) years of age. (Tr. 177). In addition, Dr. Wilkins-Jones confirmed that she concluded based on the noise level test results provided by Mr. Cowden that Claimant's noise-induced hearing loss was not a result of his employment with Employer. (Tr. 178). Instead, Dr. Wilkins-Jones concluded Claimant's noise-induced hearing loss was from either previous employment around noise or leisure activities. (Tr. 178; EX-4, p. 2).

Dan Deakle's Testimony

Dan Deakle resides in Mobile County and is employed by Employer. (Tr. 179-180). Mr. Deakle has been employed by Employer for a total of sixteen (16) years. Currently, Mr. Deakle is employed as operations manager for Mobile-Jackson County. (Tr. 180). Besides being employed as an operations manager, Mr. Deakle has also worked as a yard person, truck driver, sales manager, plant operator, project manager, general manager, and dispatcher. (Tr. 181). Mr. Deakle testified he knew Claimant from his work with Employer and that he met Claimant in 2002. (Tr. 181-182). Mr. Deakle testified further that Employer provided two Ingalls facilities in Pascagoula, Mississippi with ready mix concrete. (Tr. 190-191). At the one facility, Employer provided Ben M. Radcliff and R.J. Baggett with ready mix concrete for construction of an addition to a side of the shipyard for purposes of constructing a facility for repairs of the USS Cole. (Tr. 190). The other Ingalls facility was located at Industrial Road in Pascagoula and was where Employer provided ready mix concrete to Ingalls for construction of a bridge over a river. (Tr. 191).

Mr. Deakle stated he worked for Employer for one and one-half (1½) years at Ingalls Industrial Road facility. Mr. Deakle was the project manager and plant manager at Employer's on-site plant at this facility. (Tr. 185). As plant manager, Mr. Deakle loaded the trucks and checked-in with the customers to make sure they were receiving what they ordered. (Tr. 186). Mr. Deakle testified that Employer was a vendor of Ben M. Radcliff and R.J. Baggett at the other Ingalls site and that Employer provided Ben M. Radcliff and R.J. Baggett with ready mix concrete. (Tr. 186-187). According to Mr. Deakle, none of Employer's employees boarded vessels as part of their employment with Employer. (Tr. 189, 198). Mr. Deakle testified that an employee might have to go into an existing building to deliver concrete for a repair project, but that the work at the Ingalls Industrial Road site was not a repair project; but, rather was a new construction project. (Tr. 189-190). According to Mr. Deakle, Employer prefers to have its plants within a thirty (30) minute range from one another because of the limited shelf life of ready mix concrete. (Tr. 192-193).

Mr. Deakle testified he personally only witnessed concrete delivered to a vessel once and that the concrete was unloaded from the truck and loaded onto the vessel through use of a crane and bucket. (Tr. 194-195). Mr. Deakle further testified that the only time he witnessed concrete poured for a vessel was for ballast. (Tr. 194). Mr. Deakle stated that he never saw a vessel which was at the exact same level as the dock so that a concrete truck could be backed up in order to unload concrete directly onto the vessel through use of the chute on the truck. (Tr. 194, 197). Mr. Deakle suggested that perhaps a barge could receive a delivery of concrete in such a manner but that he had never witnessed such a delivery. (Tr. 194-195, 197). In addition, Mr. Deakle stated that pump trucks are typically used to unload concrete from the concrete trucks. (Tr. 195, 197-198).

According to Mr. Deakle, Employer provided its employees with earplugs. (Tr. 198). Mr. Deakle stated that delivery of concrete to the Ingalls facilities was similar to deliveries to other constructions sites such as home construction sites in that the loading and unloading process was the same. For both sites, a concrete truck driver would have his truck loaded, drive

to the job site, deliver the concrete, wash down his truck, and return to the loading site. (Tr. 198-199).

On cross-examination, Mr. Deakle testified that when pump trucks are used to unload concrete onto vessels, there are usually men on board the vessel who work for either the contractor or contractor's concrete finisher who handle the hose from the pump truck which extends to the vessel. (Tr. 202-203). Mr. Deakle testified that the vessels to which concrete was delivered were typically in navigable waters. (Tr. 203). Mr. Deakle stated that the only occasions he witnessed concrete being delivered to a vessel was for ballast because for whatever reason the vessel was listing, and on those occasions the concrete was delivered through the use of a pump truck or a trailer pump. (Tr. 204-205). Mr. Deakle acknowledged that it might be possible to deliver concrete directly to a vessel using the chute on the concrete truck if the vessel was low enough for the chute to get over the barrier in order to dump concrete directly onto the vessel. However, Mr. Deakle reiterated that he has never seen concrete delivered to a vessel in such a manner. (Tr. 205-206).

Mr. Deakle confirmed that earplugs as well as safety glasses and hard hats are kept in each of Employer's plants. According to Mr. Deakle, it is incumbent upon each employee to make sure they have a pair of earplugs with them in their trucks in case they are required to wear them at a site. (Tr. 206). Mr. Deakle stated that wearing of earplugs at Ingalls is not required. (Tr. 206-207). Instead, employees are required to wear safety glasses, hard hats and steel-toed boots. (Tr. 207).

On re-direct examination, Mr. Deakle stated that the persons loading and pouring the concrete from the pump trucks are not employed by Employer. (Tr. 207-208). Mr. Deakle also stated that while at Ingalls he only saw signs directing people to wear hearing protection when entering the machine shop and fabrication facility. (Tr. 208-209). Mr. Deakle confirmed that for Employer's employees hearing protection at Ingalls was not required. (Tr. 210-211). On re-cross-examination, Mr. Deakle testified he did not know the requirements for Ingalls workers who worked on vessels. (Tr. 211-212). Mr. Deakle also testified that Employer, in his experience, never provided concrete to Ingalls for use on a ship. Rather, Employer provided concrete to Atlantic Marine for use on vessels. (Tr. 212-213). Mr. Deakle further testified that Employer's plant at Ingalls was on the warehouse side of the yard and not near the vessels. (Tr. 211-213). On re-redirect examination, Mr. Deakle stated that he could see the concrete truck drivers' activities at the Ingalls site and at Atlantic Marine when he was assigned to that site. (Tr. 213-215). On re-recross-examination, Mr. Deakle confirmed that while at Ingalls he was able to see concrete truck drivers' activities at the site. (Tr. 219-220).

IV. DISCUSSION

A. Argument of the Parties

Claimant contends he suffers from a 7.5% binaural hearing impairment as a result of his five and one-half (5½) years of employment with Employer, arguing that during that time he was

exposed to injurious noise levels. Claimant maintains he is entitled to compensation and benefits under the Act since during his employment with Employer he made approximately forty (40) deliveries of concrete to various waterfront facilities for the purposes of ship repair or construction, citing, ***Dennis v. Boland Marine and Manufacturing***, 13 BRBS 528 (1981); ***Hawkins v. Reid Associates***, 26 BRBS 8 (1992); ***Northeast Marine Terminal Co., v. Caputo***, 432 U.S. 249 (1977); ***Atlantic Container Service, Inc., v. Coleman***, 904 F. 2d 611 (11th Cir. 1990). Claimant also contends he is entitled to penalties under the Act since Employer did not timely controvert his claim, citing ***Bath Iron Works Corp. v. Director, OWCP***, 506 U.S. 153 (1993); ***Renfroe v. Ingalls Shipbuilding, Inc.*** 30 BRBS 101 (1996); ***Pullin v. Ingalls Shipbuilding***, 27 BRBS 45 (1993). In addition, Claimant contends he is entitled to an award of attorney's fees under Section 28 of the Act.

Employer argues: (1) Claimant is not covered by the Act as there is nothing inherently maritime about driving a cement truck; (2) Claimant should be judicially estopped from pursuing this claim since he did not disclose the pendency of this claim in his bankruptcy petition; and (3) Claimant failed to prove his hearing loss was a result of his employment with Employer. Employer contends Claimant is not covered under the Act since he merely delivered concrete to a general contractor. Employer argues Claimant's deliveries of concrete to Ingalls and Alabama State Docks were no different from his deliveries to a residential home. Accordingly, Employer maintains Claimant as a truck driver who merely delivered concrete to a shipyard is not covered under the Act, citing 33 U.S.C. § 903(a); ***Northeast Marine Terminal Co., Inc. v. Caputo***, 432 U.S. 249, 267 (1977); ***P.C. Pfeiffer Co., Inc., v. Ford***, 444 U.S. 69, 83 (1979); ***Herb's Welding, Inc., v. Gray***, 470 U.S. 414, 430-431 (1985); ***Zube v. Sun Refining & Marketing Co.***, 31 BRBS 50 (1997); ***Terelmezian v. J.H. Reid Gen. Contracting***, 37 BRBS 112 (2003); ***McKenzie v. Crowley America Transport, Inc.***, 36 BRBS 41 (2002).

In addition, Employer argues Claimant should be judicially estopped from recovery for his claim under the Act since he did not disclose the pendency of his claim in his bankruptcy suit which was initiated after the filing of this claim, citing ***McKinnon v. Blue Cross & Blue Shield***, 935 F. 2d 1187, 1192 (11th Cir. 1991); ***Direct Air v. Fairchild Aircraft***, 189 B.R. 444, 453 (N.D. Ill. 1995); ***Payless Wholesale Distribs., Inc., v. Alberto Culver, Inc.***, 989 F. 2d 570, 571 (1st Cir. 1993); ***Barger v. City of Cartersville***, 348 F. 3d 1289 (11th Cir. 2003). Employer also argues Claimant should not be awarded compensation and benefits under the Act since Claimant failed to prove his hearing loss was a result of his employment with Employer.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. ***Banks v. Chicago Grain Trimmers Association, Inc.***, 390 U.S. 459, 467 (1968); ***Louisiana Insurance Guaranty Ass'n v. Bunol***, 211 F.3d 294, 297 (5th Cir. 2000); ***Hall v. Consolidated Employment Systems, Inc.***, 139 F.3d 1025, 1032 (5th Cir. 1998); ***Atlantic Marine, Inc., v. Bruce***, 551 F.2d 898, 900 (5th Cir. 1981); ***Arnold v. Nabors Offshore Drilling, Inc.***, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and

supported by substantial evidence based on the record as a whole. ***Banks v. Chicago Grain Trimmers Association, Inc.***, 390 U.S. at 467; ***Mijangos v. Avonldale Shipyards, Inc.***, 948 F.2d 941, 945 (5th Cir. 1991); ***Huff v. Mike Fink Restaurant, Benson's Inc.***, 33 BRBS 179, 183 (1999).

In this case, I was impressed with the sincerity, testimony and records of Mr. Cowden, Dr. Wilkins-Jones, and Mr. Deakle. I find Claimant's testimony, on the other hand, riddled with inconsistencies, contradictions, and inexplicable denials. Overall, I was unimpressed by Claimant's inconsistent and unsupported testimony and find myself unable to credit much of his testimony. Claimant testified that in his five and one-half (5½) years employment with Employer, he delivered concrete to various waterfront facilities on approximately forty (40) occasions, twenty (20) of which were allegedly to Ingalls in Pascagoula, Mississippi. (Tr. 26-27, 37, 41). However, in his testimony before the NLRB, Claimant stated he only made deliveries to Mississippi on a few occasions. (Tr. 59-64). In the hearing before me, Claimant attempted to reconcile this inconsistency in his testimony by stating that he was not asked what he meant by a few occasions and that what he meant was ten (10), twenty (20) or "how many" since he worked for Employer for over five (5) years. (Tr. 61-62).

In addition, Claimant testified that some of his deliveries of concrete to Ingalls were unloaded directly from his truck unto vessels in navigable waters. (Tr. 39, 57-59). Claimant's testimony was contradicted by the testimony of Employer's witness, Mr. Deakle, who testified that in his sixteen (16) years of employment with Employer he has never seen concrete delivered to a vessel in such a manner. (Tr. 180, 194-195, 197, 205-206). Mr. Deakle also testified that to his knowledge Employer did not provide concrete to Ingalls for use on vessels. (Tr. 212-213). Besides being contradicted by Mr. Deakle's testimony, Claimant also contradicted his own testimony when he stated that when concrete was unloaded directly from his truck at Ingalls it was done at a "spot" that wasn't near the water. (Tr. 39).

Furthermore, Claimant testified that he delivered concrete to Alabama State Docks and Atlantic Marine for decks of ships. (Tr. 27-28, 34). Claimant's testimony contradicted Mr. Deakle's testimony wherein Mr. Deakle testified Employer occasionally provided Atlantic Marine with concrete for use on vessels for purposes of ballast. (Tr. 204-205, 212-213). Claimant also testified he wore ear plugs on occasion during his employment with Employer although the letter from Dr. Beverly indicated Claimant told her he did not use hearing protection while he worked for Employer. (Tr. 40-41, 72-73; CX-10, p. 1).

On cross-examination, Claimant denied he told Dr. Beverly that he did not wear ear plugs during his employment with Employer. (Tr. 72-73). Claimant also denied telling Dr. Beverly that: 1) he has suffered with fluctuating hearing difficulties with tinnitus and aural fullness binaurally since 1998, testifying instead that he has had hearing problems for the past three (3) or four (4) years; 2) that he worked for International Paper where he was exposed to loud noises from machinery and other equipment, testifying instead that he wore hearing protection; and 3) that he worked as a longshoreman at Alabama State Docks for a total of one (1) year over a three (3) year period where he was exposed to loud noise from heavy machinery and occasionally used hearing protection, testifying instead that he worked as a longshoreman for a total of two (2) or three (3) days over a three (3) year period and was not exposed to loud noise. (Tr. 41-42, 49, 70,

71, 73, 75-79; CX-10, p. 1). Claimant admitted he told Dr. Beverly he worked for International Paper but stated he meant to say he worked for BE & K at International Paper and only had to wear hearing protection when he went inside the International Paper plant. (Tr. 71, 75-76). In addition, Claimant suggested Dr. Beverly misunderstood him when he relayed to her information regarding his employment history at Alabama State Docks. (Tr. 78-79).

Besides denying reported representations provided by him to Dr. Beverly, Claimant denied loading and unloading vessels while he worked as a longshoreman at Alabama State Docks. (Tr. 49-40). However, Claimant acknowledged that while he worked at Alabama State Docks he took potatoes and vegetables off of vessels. (Tr. 47-50). Claimant also denied filing a claim for benefits under the Act although he conceded a claim was filed by his attorney. (Tr. 98-100). In addition, Claimant denied having been involved in a traffic collision which ultimately resulted in his being terminated from Employer's employ. (Tr. 81-82, 95-96; EX-12, p. 38). Claimant also failed to document his pending claim for benefits in his bankruptcy suit even after being alerted to the omission by bankruptcy court personnel. (Tr. 100-107; EX-13, pp. 1-22).

In sum, I was impressed with the sincerity, testimony and records of Mr. Cowden, Dr. Wilkins-Jones, and Mr. Deakle. I was unimpressed by Claimant's inconsistent and unsupported testimony as I find Claimant's testimony riddled with inconsistencies, contradictions, and inexplicable denials. Since I find Claimant's testimony riddled with inconsistencies, contradictions, and inexplicable denials, I do not credit much of his testimony. I do, however, credit Claimant's corroborated and uncontradicted testimony. To that extent, I credit Claimant's testimony that: 1) he delivered concrete to Alabama State Docks and Atlantic Marine for use on piers or docks on approximately twenty (20) different occasions. (Tr. 26-27, 28, 34, 37, 212-213); 2) at Alabama State Docks and Atlantic Marine, pumps or pump trucks were used to unload the concrete from Claimant's truck after which the pumps or pump trucks were used to deliver the concrete to a pier or dock at the shipyard (Tr. 30-32, 37-40, 195, 197-198); 3) the persons loading and pouring the concrete from the pumps or pump trucks were not employed by Employer (Tr. 207-208); 4) on occasion Claimant delivered concrete to Ingalls Industrial Road plant for the purposes of constructing a bridge over a river (Tr. 37-38, 190-191); 5) at that Ingalls plant, pumps or pump trucks were used to unload the concrete from Claimant's truck (Tr. 39-40, 195, 197-198); 6) the persons loading and pouring the concrete from the pumps or pump trucks were not employed by Employer (Tr. 207-208); 7) he never boarded a vessel at Ingalls or Alabama State Docks during his employment with Employer (Tr. 56-57); 8) he filed a petition for bankruptcy on October 14, 2005, four (4) months after he filed his claim for benefits under the Act (Tr. 100; EX-13, pp. 1-22); 9) he failed to document his pending claim under the Act in his bankruptcy suit even after being alerted to the omission by bankruptcy court personnel (Tr. 100-107; EX-13, pp. 1-22); and 10) he was involved in a traffic collision which resulted in his termination from employment with Employer. (Tr. 81, 95-96; EX-12, p. 38).

C. Jurisdiction

In 1972 Congress amended the Act, expanding both the term "employee" and the concept of coverage. Section 902(3) was amended to read as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 902(3). While Section 903(a) was amended to read as follows:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 903(a). Following these amendments, the Supreme Court directed in *Northeast Marine Terminal Co., Inc., v. Caputo*, that an expansive view of the extended coverage of the 1972 Amendments be taken and "[t]he Act…liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." ***Northeast Marine Terminal Co., Inc., v. Caputo***, 432 U.S. 249, 268 (1977). The Supreme Court also made clear following these amendments that in order for a claimant to be covered under the Act as amended, he must satisfy both a "status" and "situs" test. ***See***, ***Herb's Welding, Inc., v. Gray***, 470 U.S. 416 (1985).

Status

Status is an occupational test requiring an examination of the character of the work to see whether the claimant's activities bear a significant relationship to traditional maritime activity. Status may be determined either upon the maritime nature of claimant's activity at the time of his injury or upon the maritime nature of his employment as a whole. ***Miller v. Central Dispatch, Inc.***, 673 F.2d 773, 781 (5th Cir.1982); ***Thibodaux v. Atlantic Richfield Co.***, 580 F.2d 841 (5th Cir 1978). The first alternative is referred to as the "moment of injury" test while the second alternative requires only that the claimant spend "some" portion of his overall employment performing maritime activities. ***Northeast Marine Terminal Co., v. Caputo***, 432 U.S. at 273; ***P.C. Pfeiffer Co. v. Ford***, 444 U.S. 69, 82-83 (1979); ***Boudloche v. Howard Trucking Co.***, 632 F.2d 1346 (5th Cir. 1980); ***See also***, ***Lennon v. Waterfront Transport***, 20 F.3d 658 (5th Cir. 1994).

In *Chesapeake & Ohio Railroad Co. v. Schwalb*, the Supreme Court held that employees not specifically enumerated in Section 902(3) were covered by the Act only if they are engaged in an activity that was an integral part of and essential to the overall loading and unloading process. ***Chesapeake & Ohio Railroad Co., v. Schwalb***, 493 U.S. 40, 47 (1990). In *Munguia v. Chevron U.S.A., Inc.*, the Fifth Circuit found that when focusing on the "loading and unloading test" for maritime employment, there is at least an implicit requirement that what is loaded or unloaded is "cargo." ***Munguia v. Chevron U.S.A., Inc.***, 999 F.2d. 808, 813 n. 8 (5th Cir. 1993).

The Fifth Circuit also noted in *Hullinghorst Industries, Inc., v. Carroll*, that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lie within the scope of "maritime employment" as that term is used in the Act. ***Hullinghorst Industries, Inc., v. Carroll***, 650 F.2d 750, 755 (5th Cir. 1981); ***See also***, ***Peterson v. General Dynamics Corp.***, 25 BRBS 71 (1991). However, the Benefits Review Board has held that mere involvement in activity which supports the construction of vessels is not sufficient to grant a claimant status. ***Gonzalez v. Merchants Building Maintenance***, 33 BRBS 146 (1999) (citing, ***Chesapeake & Ohio Railroad Co., v. Schwalb***, 493 U.S. 40). In addition, the Supreme Court has held that "employees such as truckdrivers[ ] whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded or destined for maritime transportation are not covered" under the Act. ***Northeast Marine Terminal Co., v. Caputo***, 432 U.S. at 267; ***See also***, ***Herb's Welding, Inc., v. Gray***, 470 U.S. at 430-431 (Marshall, J., dissenting) (stating, "Workers such as truckdrivers or clericals, though present on a pier at certain times as part of their employment, are engaging in purely land-bound, rather than amphibious, occupations.") (citing, ***Northeast Marine Terminal Co., Inc., v. Caputo***, 432 U.S. at 267); ***P.C. Pfeiffer Co. v. Ford***, 444 U.S. at 83 (stating, "There is no doubt for example, that neither the driver of the truck carrying cotton to Galveston nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment even though he was working on the maritime situs. Such a person's 'responsibility is only to pick up stored cargo for further transshipment.'") (Citations omitted.

According to the Supreme Court, a claimant satisfies the status requirement for coverage if he spends "at least some of his time engaged in indisputably covered activities." ***Northeast Marine Terminal Co., Inc., v. Caputo***, 432 U.S. at 273. The Fifth Circuit interpreted this holding strictly in *Boudloche v. Howard Trucking Co., Inc.*, specifically rejecting a "substantial portion" requirement and held that two and one-half percent (2½%) to five percent (5%) of the claimant's time spent loading and unloading was satisfactory. ***Boudloche v. Howard Trucking Co., Inc.***, 632 F.2d 1346, 1347 (5th Cir. 1980). Likewise, in *McGoey v. Chiquita Brands International*, the Benefits Review Board held that the Administrative Law Judge's finding that claimant spent three percent (3%) to five percent (5%) of his time in a covered activity alone was enough to invoke coverage under *Caputo* and *Boudloche*. ***McGoey v. Chiquita Brands International***, 30 BRBS 237 (1997) (citing, ***Ferguson v. Southern States Cooperative***, 27 BRBS 16 (1993)).

While the actual numerical percentage of time spent by claimant in a covered activity plays an important role in this analysis, it is not the most crucial factor. It is not the overall frequency with which claimant performed the activity which is controlling. ***See***, ***McGoey v. Chiquita Brands International***, 30 BRBS at 239; ***Lewis v. Sunnen Crane Service, Inc.***, 31 BRBS 34, 40 (1997). Rather, it is whether the covered activity is one which is regularly performed as a portion of the overall tasks which claimant is assigned which makes the ultimate determination. ***See***, ***Boudloche v. Howard Trucking Co., Inc.***, 632 F.2d at 1348; ***McGoey v. Chiquita Brands International***, 30 BRBS at 239 (citing, ***Levins v. Benefit Review Board***, 724 F.2d 4 (1st Cir. 1984)); ***Lewis v. Sunnen Crane Service, Inc.***, 31 BRBS at 40. If regularly performed, the covered activities will not be intermittent, sporadic, and incidental to claimant's non-maritime job duties, and therefore, afforded protection under the Act. ***Lewis v. Sunnen Crane Service, Inc.***, 31 BRBS at 40.

In the present case, Claimant's credited testimony indicates during Claimant's employment with Employer, Claimant delivered concrete to Alabama State Docks and Atlantic Marine for use on piers or docks on approximately twenty (20) different occasions. (Tr. 26-27, 28, 34, 37, 212-213). At Alabama State Docks and Atlantic Marine, pumps or pump trucks were used to unload the concrete from Claimant's truck. (Tr. 30-31, 37-40, 195, 197-198). These pumps or pump trucks were then used to deliver the concrete to a pier or dock at the shipyard. (Tr. 31-32). The persons loading and pouring the concrete from the pumps or pump trucks were not employed by Employer. (Tr. 207-208). Claimant's credited testimony also indicates Claimant on occasion delivered concrete to Ingalls Industrial Road plant for the purposes of constructing a bridge over a river. (Tr. 37-38, 190-191). At this Ingalls plant, pumps or pump trucks were used to unload the concrete from Claimant's truck. (Tr. 39-40, 195, 197-198). The persons loading and pouring the concrete from the pumps or pump trucks were not employed by Employer. (Tr. 207-208).

While Claimant's credited testimony indicates Claimant delivered concrete to Alabama State Docks, Atlantic Marine, and Ingalls Industrial Road plant for use on docks and for construction of a bridge, the testimony does not support a finding of status. Claimant delivered concrete to employees or contractors at Alabama State Docks, Atlantic Marine and Ingalls Industrial Road plant who then transported and poured the concrete where necessary. Although Claimant delivered concrete to these waterfront facilities, Claimant did not participate in an activity integral to loading, unloading, or repairing ships. Rather, Claimant engaged in land-based activity of delivering concrete to these facilities for employees or contractors at the facility to transport the concrete to its final destination. In this regard, Claimant's responsibilities at Alabama State Docks, Atlantic Marine and Ingalls Industrial Road plant was not unlike the responsibilities of the truckdriver carrying cotton to Galveston or the locomotive engineer transporting military vehicles from Beaumont noted in *P.C. Pfeiffer Co., v. Ford*. As the Supreme Court concluded in *P.C. Pfeiffer Co., v. Ford*, I conclude here as well, namely, employees like Claimant are not engaged in maritime employment. Instead, these employees are engaged in land-based employment of delivering goods to a maritime situs for further transportation elsewhere by employees or contractors of the maritime situs. Accordingly, I find Claimant did not establish status under the Act.

Situs

The term "situs" has been broadly interpreted to include land not contiguous to navigable water provided the site is suitable for maritime purposes and proximate to or close as possible given all circumstances to a navigable waterway. In *Texports Stevedore Co., v. Winchester*, the Fifth Circuit stated:

> The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes.

> We would not extend coverage to downtown Houston. The site must have some nexus with the waterfront.

Texports Stevedore Co., v. Winchester, 632 F. 2d 504, 513-14 (5th Cir. 1980). Area is defined by its function, i.e., it must be customarily, but not exclusively used by an employer to load, unload, repair or build a vessel. ***Id.*** at 515. In addition, the area to be examined must be the place of injury and its relationship to navigable waters. ***Jacksonville Shipyards v. Perdue***, 539 F.2d 535 (5th Cir.1976) *vacated and remanded on other grounds*, 433 U.S. 904 (1977); ***See also***, ***Nelson v. Gray F. Athinson Construction Co.***, 29 BRBS 39 (1995); ***Brown v. Bath Iron Works Corp.***, 22 BRBS 384 (1989); ***Davis v. Dovan Co. of California***, 20 BRBS 121 (1987) *aff'd mem.*, 865 F.2d 1257 (4th Cir 1989); ***Lasofsky v. Arthur J. Trickle Engineering Works, Inc.***, 20 BRBS 58 (1987), *aff'd mem.*, 853 F. 2d 919 (3rd Cir. 1988).

In the present case, Claimant's credited testimony indicates during his employment with Employer, Claimant delivered concrete to Alabama State Docks and Atlantic Marine for use on docks on approximately twenty (20) different occasions. (Tr. 26-27, 28, 34, 37, 212-213). Claimant's credited testimony also indicates Claimant on occasion delivered concrete to Ingalls Industrial Road plant for the purposes of constructing a bridge over a river. (Tr. 37-38, 190-191). Claimant's employment with Employer commenced in November 1999 and his last day of employment was in February, 2005. (Tr. 23, 37, 42). In addition, the report prepared by Dr. Beverly and submitted by Claimant did not specifically indicate Claimant's hearing loss was the result of Claimant's employment with Employer. (CX-10, p. 2).

Claimant's inconsistent testimony, on the other hand, indicates Claimant has suffered from hearing loss since 1998, approximately one (1) year before Claimant began his employment with Employer. Claimant denied he told Dr. Beverly he has suffered from hearing loss since 1998. Instead, Claimant testified he has suffered from hearing loss for the past three (3) or four (4) years. (Tr. 41-42, 70; CX-10, p.1). Again, as I find it impossible to reconcile Claimant's testimony before me with the information Claimant provided to Dr. Beverly during his audiological evaluation, I do not credit Claimant's testimony. Therefore, my determination regarding proof of situs must be based on Claimant's credited testimony.

Claimant's credited testimony clearly shows Claimant's employment with Employer required him, at times, to deliver concrete to areas which are used for loading, unloading and repairing of vessels. However, Claimant's credited testimony does not show he was injured while he worked for Employer delivering concrete to these areas. Inasmuch as Claimant failed to prove that his injury occurred on a maritime situs, I find that he has failed to establish this essential element for coverage under the Act.

D. Judicial Estoppel

Had I concluded Claimant established coverage under the Act, I would still deny Claimant benefits under the Act as I find he is judicially estopped from pursuing his claim before this tribunal. Judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position."

Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir.1988). Judicial estoppel is designed "to protect the integrity of the judicial process" by "prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest." ***Id.*** (internal quotation marks, parentheses, and citation omitted). Since judicial estoppel "is intended to protect the judicial system, *rather than the litigants,* detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary." ***Browning Mfg. v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d 197, 205 (5th Cir. 2003) (emphasis in original, internal quotation marks, parentheses, and citation omitted), *cert. denied,* 528 U.S. 1117 (2000); ***See also***, ***Matter of Cassidy,*** 892 F.2d 637, 641 n. 2 (7th Cir.), *cert. denied,* 498 U.S. 812 (1990); ***Fox v. West State, Inc.***, 31 BRBS 118, 122 (1997); ***Manders v. Alabama Dry Dock and Shipbuilding Corp.***, 23 BRBS 19, 22 (1989).

Invocation of the doctrine of judicial estoppel is discretionary. ***Fox v. West State, Inc.***, 31 BRBS at 122. The doctrine applies equally to positions taken in quasi-judicial proceedings as it does in courts of law. ***See e.g.***, ***Rissetto v. Plumbers Steamfitters Local 343,*** 94 F. 3d 597 (9th Cir. 1996); ***Muellner v. Mars, Inc.,*** 714 F.Supp. 351, 355 (N.D.Ill.1989); ***Long Island Lighting Company v. Transamerica Delaval,*** 646 F.Supp. 1442, 1447 (S.D.N.Y.1986). A court should apply judicial estoppel if "(1) the position of the party against which estoppel is sought is plainly inconsistent with its prior legal position; (2) the party against which estoppel is sought convinced a court to accept the prior position; and (3) the party did not act inadvertently." ***Jethroe v. Omnova Solutions, Inc.***, 412 F. 3d 598, 600 (5th Cir. 2005) (citing, ***Browning Mfg. v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d at 206-207). To establish that one's "failure to disclose was inadvertent, [one] may prove either that [he] did not know of the inconsistent position or that [he] had no motive to conceal it from the court." ***Id.*** at 600-601 (citing, ***Browning Mfg. v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d at 210). More particularly, one "must show not that [he] was unaware that [he] had a duty to disclose [his] claims but that, at the time [he] filed [his] bankruptcy petition, [he] was unaware of the facts giving rise to them." ***Id.*** at 601 (citing, ***Browning Mfg., v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d at 211-212).

Judicial estoppel "is particularly appropriate where a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset." ***Jethroe v. Omnova Solutions, Inc.***, 412 F. 3d at 600; ***See also***, ***Hay v. First Interstate Bank of Kalispell, N.A.,*** 978 F.2d 555, 557 (9th Cir.1992) (failure to give notice of a potential cause of action in bankruptcy schedules and Disclosure Statements estops the debtor from prosecuting that cause of action); ***Browning Mfg. v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d at 208 (holding that a debtor is barred from bringing claims not disclosed in its bankruptcy schedules); ***Matter of Criswell***, 102 F.3d 1411 (5th Cir.1997) (Chapter 7 trustee judicially estopped from asserting that creditor was not transferee of oil and gas properties that debtor fraudulently conveyed to children, because trustee succeeded in preference action based on assertion that creditor's lien was a transfer); ***Eubanks v. F.D.I.C.,*** 977 F.2d 166 (5th Cir.1992) (res judicata effect of order confirming plan of reorganization barred debtors from asserting undisclosed claims); ***Payless Wholesale Distributors, Inc., v. Alberto Culver (P.R.) Inc.,*** 989 F.2d 570, 572 (1st Cir.), *cert. denied,* 510 U.S. 931 (1993) (debtor who obtained relief on the representation that no claims existed cannot resurrect such claims and obtain relief on the opposite basis); ***Oneida Motor Freight, Inc., v. United Jersey Bank,*** 848 F.2d 414, 419 (3rd Cir.), *cert. denied,* 488 U.S. 967 (1988) (debtor's failure to list potential claims against a creditor "worked in opposition to preservation of the integrity of the system which the doctrine of judicial

estoppel seeks to protect," and debtor is estopped by reason of such failure to disclose). The Bankruptcy Code and Rules "impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims*." ***Browning Mfg., v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d at 207-208 (emphasis in original) (citing, 11 U.S.C. § 521(1)).

In a bankruptcy proceeding, "[t]he interests of both the creditors, who plan their actions in the [ ] proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete." ***Browning Mfg., v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d at 208. When "viewed against the backdrop of the bankruptcy system and the ends it seeks to achieve, the importance of this disclosure duty cannot be overemphasized." ***Id.*** at 208 (citing, ***Oneida Motor Freight, Inc., v. United Jersey Bank,*** 848 F.2d 414 (3rd Cir.) (discussing importance of disclosure to creditors and to bankruptcy court), *cert. denied,* 488 U.S. 967 (1988)). A debtor's "obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one." ***Jethroe v. Omnova Solutions, Inc.***, 412 F. 3d at 600 (citing, ***Browning Mfg., v. Mims*** (***In re Coastal Plains, Inc.,***), 179 F. 3d at 207-208). As such, a debtor is "under a duty to both disclose the existence of [ ] pending [claims] when [he] file[s] [his] petition and to disclose [his] potential legal claims throughout the pendency of that petition." ***Id.*** (citing, ***Browning Mfg., v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d at 208). Merely "notifying [a] trustee by mail or otherwise is insufficient to escape judicial estoppel." ***Hamilton v. State Farm Fire & Casualty Co.***, 270 F. 3d 778, 784 (9th Cir. 2001). The obligation placed upon debtors by 11 U.S.C. § 521(1) expressly requires debtors to amend their disclosure statements and schedules to provide the requisite notice. ***Id.*** (citing, ***Browning Mfg., v. Mims*** (***In re Coastal Plains, Inc.***), 179 F. 3d at 206).

In the instant case, Claimant confirmed he filed for bankruptcy on October 14, 2005, four (4) months after he filed his claim for benefits under the Act. (Tr. 100; EX-13, pp. 1-22). Claimant further confirmed he did not disclose his pending claim in his bankruptcy petition. (Tr. 100-101). Instead, Claimant claimed to have verbally informed the bankruptcy court shortly before the hearing with the undersigned of his pending claim as well as his NLRB claim and civil suit. (Tr. 101-102, 104). Claimant stated he filed his bankruptcy petition on his own so he misunderstood what he was suppose to disclose in the petition. (Tr. 101, 103-104). However, Claimant stated bankruptcy court personnel required him to add his claim, his NLRB claim, and his civil suit to his bankruptcy paperwork. (Tr. 104). Yet, Claimant acknowledged that none of these claims were listed in his cumulative amendments which were filed on May 12, 2006. (Tr. 104-107; EX-13, p. 15). Claimant suggested bankruptcy court personnel might have simply kept the documents regarding these claims instead of making a notation of the claims on his bankruptcy paperwork. (Tr. 107). Claimant's testimony clearly shows Claimant failed to document his pending claim in his bankruptcy suit even after being alerted to the omission by bankruptcy court personnel. (Tr. 100-107; EX-13, pp. 1-22).

Applying the elements of judicial estoppel as outlined in *Jethroe v. Omnova Solutions, Inc.,* I find the first element is satisfied in this case. Claimant filed his claim for benefits approximately four (4) months before he filed his bankruptcy petition. Claimant represented in his bankruptcy petition that he was not a party to any suits or administrative proceedings within one (1) year from the filing of his petition. Claimant was alerted by bankruptcy court personnel

as to a need for information regarding his claim before this tribunal as well as two (2) other claims in other forums. Claimant, at no time, documented any of these claims in his bankruptcy suit. Clearly Claimant's position in his bankruptcy proceeding is inconsistent with his position before this tribunal. Therefore, I find the first element of judicial estoppel is satisfied in this case.

I also find the second element of judicial estoppel is satisfied. I am certain the bankruptcy court resolved Claimant's petition for bankruptcy at least in part based on its assessment of Claimant's assets and liabilities. Since Claimant did not provide the requisite notice required of him under 11 U.S.C. § 521(1) regarding the pendency of his claim before this tribunal, the resolution reached by the bankruptcy court was made, at least partly, on Claimant's position that he was not a party to any suits or administrative proceedings within one (1) year from the filing of his petition. In other words, any resolution reached by the bankruptcy court was, at least in part, based on Claimant's prior inconsistent position that he was not a party to any pending claims. Therefore, I find the second element of judicial estoppel is satisfied in this case.

In addition, I find the third and final element of judicial estoppel is here satisfied. Claimant, who prepared and filed his own bankruptcy petition, claims to have misunderstood the disclosure requirements of a bankruptcy petition. Had the necessity of disclosure not been addressed with Claimant, Claimant would have a stronger argument supporting inadvertence. However, Claimant was alerted to the omission of this claim from his bankruptcy suit and acknowledged he was required to document this claim in his suit. Nevertheless, Claimant at not time documented the pendency of this claim in his bankruptcy suit. Instead, Claimant testified he verbally informed bankruptcy court personnel of the pendency of this claim. Certainly if a letter to a trustee notifying him of a pending claim is insufficient to escape judicial estoppel, simply claiming to have verbally informed bankruptcy court personnel of a pending claim is likewise insufficient. Therefore, I find the third and final element of judicial estoppel is satisfied in this case. Accordingly, I find Claimant is judicially estopped from pursuing his claim for benefits under the Act.

V. CONCLUSION

Inasmuch as Claimant failed to prove he engaged in maritime employment during his employment with Employer and failed to prove that his injury occurred on a maritime situs, I find that he has failed to establish these essential elements for coverage under the Act. Accordingly, I find Claimant is not entitled to benefits under the Act. I also find had Claimant established coverage under the Act, Claimant is judicially estopped from pursuing his claim before this tribunal. As such, I find it unnecessary to discuss the other issues raised by the parties.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

As Claimant failed to establish coverage under the Act, I find no merit to and deny the instant claim. I also find that had Claimant established coverage under the Act, Claimant is judicially estopped from pursuing his claim before this tribunal because of his prior inconsistent position in his bankruptcy suit.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE